the word "income." [23] Courts had not at the time of the adoption of the Sixteenth Amendment nor have they to-day adopted a definite construction of the term.[24] The Supreme Court has recognized that the word must be defined as used in common speech.[25] Finally Congress, a coördinate branch of the federal government, has expressly enacted that capital increment is income.[26] This last factor should be decisive. It is a settled principle of constitutional construction that a legislative interpretation of the Constitution is entitled to the greatest respect and that no act of Congress will be declared unconstitutional if it is consistent with any reasonable interpretation of the Constitution.[27] It is submitted that a definition of income to include all increases in the taxpayer's financial resources which come to him from his labor or from his property is not so broad as to be deemed unreasonable. It follows that to declare unconstitutional an act of Congress taxing capital increment as income when realized by sale is not only to infringe upon a well established rule of constitutional construction but to strike a blow at the foundation of our institutions as well. The attitude of the majority of the court in *Eisner* v. *Macomber* in riding rough-shod over Congress' interpretation of the Sixteenth Amendment raised a storm of criticism; [28] a declaration that capital increment cannot be taxed might well be followed by a constitutional amendment recalling the decision.[29]

REPEAL OF TAX EXEMPTIONS, AND THE CONTRACT CLAUSE OF THE FEDERAL CONSTITUTION. — A legislative enactment exempting property from taxation *in futuro* may constitute a contract, with the result that a repeal of the exemption by a subsequent legislature would violate the contract clause [1] of the Federal Constitution.[2] More than half a century

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[23] See SELIGMAN, THE INCOME TAX, 2 ed., 19. For an excellent analysis taking the view that capital increment is income provided there is separation and realization, see Edwin R. A. Seligman, "Are Stock Dividends Income?" 9 AM. ECON. REV. 517. This seems to have been Mr. Justice Pitney's theory in Eisner *v.* Macomber, note 1, *supra*.

[24] In Massachusetts capital increment is taxable as income. Trefry *v.* Putnam, 227 Mass. 522, 116 N. E. 904 (1918). *Contra*, State *ex rel.* Bundy *v.* Nygaard, 163 Wis. 307, 158 N. W. 87 (1916).

[25] See note 1, *supra*, 193.

[26] See Income Tax Act of 1913, 38 STAT. AT L. 167; Income Tax Act of 1916, 39 STAT. AT L. 757; Income Tax Act of 1918, 40 STAT. AT L. 1065.

[27] See Ware *v.* Hylton, 3 Dall. (U. S.) 199, 237 (1796); Cooper *v.* Telfair, 4 Dall. 14, 18 (1800); Fletcher *v.* Peck, 6 Cranch (U. S.) 87, 128 (1810); Ogden *v.* Saunders, 12 Wheat. (U. S.) 213, 270 (1827); Sinking Fund Cases, 99 U. S. 700, 718 (1878). See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 252. See James B. Thayer, "The American Doctrine of Constitutional Law," 7 HARV. L. REV. 129, 138.

[28] See Thomas Reed Powell, "Stock Dividends, Direct Taxes, and the Sixteenth Amendment," 20 COL. L. REV. 536, 538.

[29] The desirability of a tax on capital increment has been pointed out. See Edward H. Warren, note 22, *supra*, 900. See also Charles E. Clark, "Some Income Tax Problems," 29 YALE L. JOUR. 735, 738.

[1] See UNITED STATES CONSTITUTION, Art. I, Sec. 10, § 1, "No State shall . . . pass any . . . law impairing the obligation of contracts."

[2] See cases in note 12, *infra*.

has elapsed since Samuel Freeman Miller, a distinguished justice of the United States Supreme Court, predicted that this proposition would eventually be abandoned.[3] Yet undeniably this doctrine has not to this day been dislodged. On the whole, it does seem that it would have been better to have recognized squarely that no legislature had any power to bargain away the unlimited scope of its successors' taxing prerogative. At any rate such an enactment, if a contract at all, should never have been deemed within the limitation imposed by the contract clause. Though *stare decisis* militates powerfully against an overthrow of this doctrine, the fulfillment of Mr. Justice Miller's forecast may yet be seen.

If constant hedging is in any way indicative of the unsoundness of a rule of law, witness the ways which have been found to restrict and delimit the application of the general proposition. In the first place, any one who resists a repeal of a legislative tax exemption, will have to cope with an unusually rigorous construction of the alleged exemption — every intendment being in favor of the existence of the taxing power.[4] A curtailment of the right to tax will in no wise be presumed. "The language in which the surrender is made must be clear and unmistakable." [5] Secondly, a not infrequent device is to demonstrate that the legislative enactment granting the tax exemption was not a contract at all, not a bargain in any sense, but a spontaneous concession granted by the legislature — a law belonging to that class denominated *privilegia favorabilia*.[6] Thirdly, the governmental prerogative has been vindicated in a host of cases by the holding that the exemption was personal and non-assignable [7] — the later cases going to a remarkable extent in this regard. Fourthly, at the time of the award of the exemption, a general statute making all laws repealable may have been in existence. Such a statute has been held to preclude an unimpairable obligation to continue the tax exemption.[8] And of course the existence of a constitutional inhibition as to tax exemption legislation will invalidate any contract

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[3] In the dissenting opinion to Washington University *v.* Rouse, 8 Wall. (U. S.) 439, 444 (1869).

[4] See Covington *v.* Kentucky, 173 U. S. 231, 239 (1898); Chicago R. R. Co. *v.* Guffey, 120 U. S. 569, 575 (1886); C. & O. Ry. Co. *v.* Miller, 114 U. S. 176, 181 (1884); Memphis Gas Co. *v.* Shelby County, 109 U. S. 398, 400 (1883); Tucker *v.* Ferguson, 22 Wall. (U. S.) 527, 575 (1874); Ohio Ins. Co. *v.* Debolt, 16 How. (U. S.) 416, 435, 436 (1853); Providence Bank *v.* Billings, 4 Pet. (U. S.) 514, 561 (1830).

[5] See Erie R. R. Co. *v.* Pennsylvania, 21 Wall. (U. S.) 492, 498 (1874).

[6] Grand Lodge *v.* New Orleans, 166 U. S. 143 (1897); West Wis. R. R. Co. *v.* Supervisors, 93 U. S. 595 (1876); Tucker *v.* Ferguson, *supra;* Salt Co. *v.* Saginaw, 13 Wall. (U. S.) 373 (1872); Christ Church *v.* Philadelphia, 24 How. (U. S.) 300 (1860).

[7] Jetton *v.* University of the South, 208 U. S. 489 (1907); Rochester Ry. Co. *v.* Rochester, 205 U. S. 236 (1906); Phoenix Ins. Co. *v.* Tenn., 161 U. S. 174 (1896); R. R. Co. *v.* Missouri, 152 U. S. 301 (1894); R. R. Co. *v.* Alsbrook, 146 U. S. 279 (1892); Picard *v.* R. R. Co., 130 U. S. 637 (1889); C. & O. Ry. Co. *v.* Miller, *supra;* Memphis R. R. Co. *v.* Commissioners, 112 U. S. 609 (1884); R. R. Co. *v.* County of Hamblen, 102 U. S. 273 (1880); Morgan *v.* Louisiana, 93 U. S. 217 (1876); Armstrong *v.* Athens County, 16 Pet. (U. S.) 281 (1842). But *cf.* New Jersey *v.* Wilson, 7 Cranch (U. S.) 167 (1812).

[8] Covington *v.* Kentucky, *supra;* Citizens' Bank *v.* Owensboro, 173 U. S. 636 (1898); Louisville Water Co. *v.* Clark, 143 U. S. 1 (1891); R. R. Co. *v.* Maine, 96 U. S. 499 (1877); Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454 (1872).

ab initio.[9] In the latest case before the United States Supreme Court, *People on the relation of Troy Union Railroad Co.* v. *Mealy*,[10] the constitutionality of the repeal was sustained, the court making use of the second and fourth devices just mentioned. But in many cases, litigants have run the gauntlet of these obstacles,[11] and have successfully prevented the imposition of a tax[12] — a result often accompanied by a vigorous and vehement dissent.[13]

The soundness of a doctrine prohibiting repeals of State tax exemptions may be tested by decisions on the analogous problems of contracts bargaining away the police power or the power of eminent domain. A contract in express language and in unmistakable terms not to exercise one of these two powers is a rarity; sharply in contrast to the frequency of express promises not to tax. However, cogent arguments can be, and often have been, made to the effect that a charter contains an undoubtedly implied promise that it will not be destroyed or impaired by the exercise of the police power or the power of eminent domain. Yet the Supreme Court has uniformly held that these powers[14] are such vital attributes of sovereignty that no implications conducing to the restriction of these powers will be indulged in. Much of the language in these police power and eminent domain decisions would indicate that these two governmental prerogatives cannot be hampered by any con-

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[9] For examples of constitutional inhibitions, see Keokuk, etc. R. R. *v.* Missouri, 152 U. S. 301, 310 (1893); Yazoo, etc. Ry. *v.* Adams, 180 U. S. 1, 9 (1900).

[10] U. S. Sup. Ct., Oct. Term, 1920, No. 63. For the facts in this case, see RECENT CASES, p. 554, *infra*.

[11] See for other ways of upholding the government's side of the case: Memphis City Bank *v.* Tenn., 161 U. S. 190 (1896); Given *v.* Wright, 117 U. S. 648 (1885).

[12] Wright *v.* Central of Ga. R. R. Co., 236 U. S. 674 (1914); Wright *v.* Ga. Banking Co., 216 U. S. 420 (1909); Stearns *v.* Minnesota, 179 U. S. 223 (1900); Asylum *v.* New Orleans, 105 U. S. 362 (1881); Home of the Friendless *v.* Rouse, 8 Wall. (U. S.) 430 (1869); Washington University *v.* Rouse, *supra;* McGee *v.* Mathis, 4 Wall. (U. S.) 143 (1866); Dodge *v.* Woolsey, 18 How. (U. S.) 331 (1855); Piqua Bank *v.* Knoop, 16 How. (U. S.) 369 (1853); Gordon *v.* The Tax Appeal Court, 3 How. (U. S.) 133 (1845); N. J. *v.* Wilson, *supra*.

[13] Dissenting opinions of Miller, J., in Washington University *v.* Rouse, *supra*, in which Chase, C. J. and Field, J. concurred; of Campbell, J. in Dodge *v.* Woolsey, *supra*, in which Daniel, J. and Catron, J. concurred; of Catron, J. in Piqua Bank *v.* Knoop, *supra*. See also a series of opinions in 1 Oh. St., to wit, Debolt *v.* Ohio Life Ins. Co., 1 Oh. St. 563 (1853); Mechanics' & Traders' Branch *v.* Debolt, *id.*, 591; Knoop *v.* Piqua Branch, *id.*, 603; Toledo Bank *v.* Bond, *id.*, 623.

The remarks of Mr. Justice Miller merit quotation: "We do not believe that any legislative body, sitting under a State Constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which, in modern political societies, is absolutely necessary to the continued existence of every such society. . . . No civilized community has ever existed that did not depend upon taxation in some form for the continuance of that existence. To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful."

[14] As to the police power: Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746 (1883); Stone *v.* Mississippi, 101 U. S. 814 (1880); Fertilizing Co. *v.* Hyde Park, 97 U. S. 659 (1878); Beer Co. *v.* Massachusetts, 97 U. S. 25 (1877).

As to the power of eminent domain: Cincinnati *v.* R. R. Co., 223 U. S. 390 (1911); Offield *v.* R. R. Co., 203 U. S. 372 (1906); Long Island Co. *v.* Brooklyn, 166 U. S. 685 1896); West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507 (1848).

tract at all; and indeed in *Pennsylvania Hospital* v. *Philadelphia*,[15] a rather recent case in the United States Supreme Court, the court unhesitatingly concluded that a subsequent exercise of the power of eminent domain was not defeated by an existing *express* promise not to exercise that power. That the decision in this case reaches a correct result is undeniable. But just why a contrary result would have been reached, if it was an express promise not to exercise the taxing power, is somewhat difficult to see. On the decisions, one could deduce the Supreme Court's attitude to be that the taxing prerogative is of less importance than that of eminent domain,[16] in fact of such less importance that a State can cripple itself in regard to one and not as to the other. Indeed some attempt to distinguish them has been made [17] — but of an exceedingly unconvincing nature. In short, one cannot help but feel that the correct method of dealing with this problem is decisively to refuse to throw the protective mantle of the contract clause over any curtailment *in futuro* of the taxing power. And may the suggestion be ventured that in any reëxamination of the question, *Pennsylvania Hospital* v. *Philadelphia* will play a large part.

JURISDICTION TO IMPOSE A PERSONAL TAX ON ONE NOT DOMICILED BUT PRESENT WITHIN THE STATE. — It is frequently stated as a principle of law, firmly grounded in natural justice and in the authorities, that jurisdiction to impose a personal tax depends on domicil.[1] But whether the duty to pay taxes is incident to the reliance upon a sovereign for protection [2] or arises from the obligation of the members of a community

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[15] 245 U. S. 20 (1917). It is submitted that the language used by Chief Justice White is applicable to the bargaining away of the taxing power.

[16] Mr. Justice Field in Tomlinson *v.* Jessup, *supra*, 458, said: "There is no subject over which it is of greater moment for the State to preserve its power than that of taxation." Mr. Justice Hunt in Erie R. R. Co. *v.* Pa., *supra*, 499, termed taxation "the highest attribute of sovereignty." Mr. Justice Catron in his dissenting opinion in Piqua Bank *v.* Knoop, *supra*, 400, said: "The political necessities for money are constant and more stringent in favor of the right of taxation; its exercise is required to sustain the government. But in the essential attributes of sovereignty the right of eminent domain and the right of taxation are not distinguishable." And in Debolt *v.* Ohio Ins. Co., *supra*, 580, the court said: "This power [of taxation] is not to be distinguished, in any particular material to the present inquiry, from the power of eminent domain. Both rest upon the same foundation — both involve the taking of property — and both, to a limited extent, interfere with the natural right guaranteed by the Constitution, of acquiring and enjoying it."

[17] See Stone *v.* Mississippi, *supra*, 820.

Cooley in his work on CONSTITUTIONAL LIMITATIONS, 7 ed., 400, while admitting that the government cannot bargain away any of its inherent powers, and by no means approving of the doctrine as to tax exemptions, suggests the latter to be reconcilable with the police power and eminent domain cases on the ground that the consideration for such an exemption compensates for the loss in taxes.

[1] See Boreland *v.* City of Boston, 132 Mass. 89, 96 (1882). See Wharton, "Law of Domicil," BOOK OF MONOGRAPHS (1880), 4; JACOBS, LAW OF DOMICIL, § 51; WHARTON, CONFLICT OF LAWS, 3 ed., § 80.

Liability to share municipal burdens seems, in Roman law, to have depended on domicil. See 4 PHILLIMORE, INTERNATIONAL LAW, 3 ed., 33; JACOBS, DOMICIL, § 8.

[2] This is the generally accepted legal theory of the incidence of the duty. See Union